

No. 78-1571

Supreme Court, U. S.
FILED

JUN 5 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

GLENN WOO, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE
COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

DAVID FERBER
Solicitor to the Commission

MICHAEL K. WOLENSKY
Assistant General Counsel

LINDA D. FIENBERG
Special Counsel

PHILIP H. BECKER
Attorney
Securities and Exchange Commission
Washington, D.C. 20549

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1571

GLENN WOO, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE SECURITIES AND EXCHANGE
COMMISSION IN OPPOSITION**

· OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-2a) is reported at 590 F.2d 356. The opinion and order of the Securities and Exchange Commission (*id.* at 5a-12a) are reported at 13 S.E.C. Docket 147.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1979. A petition for rehearing was denied on February 12, 1979. The petition for a

writ of certiorari was filed on April 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly enforced a remedial order of the SEC prohibiting petitioner from associating with any broker-dealer.

STATEMENT

Under Section 15(b) (6) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b) (6), the Commission may, after notice and opportunity for hearing, enter sanctions against any person associated or seeking to become associated with a broker or dealer if such a person has willfully violated the federal securities laws and the sanction is in the public interest. Petitioner is an officer and a principal owner of Amswiss, a broker-dealer registered with the Commission pursuant to Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b). On September 22, 1977, the Commission¹ entered an order barring petitioner from association with any broker or dealer, provided that after 18 months petitioner could become so associated in a position not connected, directly or indirectly, with the underwriting, retail

¹ The Commission instituted the instant proceeding on September 16, 1975 (A. 1). ("A." refers to the appendix in the court of appeals.) Public hearings were held before an administrative law judge, who issued a decision and order on September 8, 1976 (A. 57). This decision was appealed to the Commission (A. 65).

sales, or trading of securities, and not involving the actual trading of securities or the setting of prices at which securities are traded or quoted (Pet. App. 13a).

The Commission's order instituting proceedings was based on petitioner's violations of the federal securities laws, as established by the district court after a trial on the merits in an action for injunctive relief. *SEC v. Cooper*, 402 F. Supp. 516 (S.D.N.Y. 1975). The district court found that petitioner participated both as underwriter and broker in a protracted scheme to manipulate the market price of the securities of Meridian Fast Food Services, Inc., an insolvent company. As a result of this scheme, the market price per share of those securities increased fourfold. *Id.* at 518-520. Petitioner admitted the allegations against him. Thus, the only questions that the Commission considered were whether the public interest required the imposition of a sanction and, on determining that it did, what sanction should be imposed.

Petitioner offered character testimony to the effect that, subsequent to his proven misconduct, he reformed and became a valuable member of the investment community. Both the administrative law judge (A. 34) and the Commission (Pet. App. 11a) stated that the agency's consideration of the public interest need not be limited to petitioner's claim of character reform, and that the agency may consider the gravity of his past misconduct. Specifically, they considered the market manipulation by petitioner that was the

subject of the proceeding and petitioner's participation in another market manipulation. See *SEC v. D'Onofrio*, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,201 (S.D. N.Y. 1975). In *D'Onofrio*, petitioner claimed he was innocent. After a trial the district court found that petitioner had been a major participant in a scheme to distribute worthless securities to the investing public, and to manipulate the price of the securities to accomplish the scheme. *Id.* at 98,015-98,019. In both *Cooper* and *D'Onofrio*, which were decided just a few weeks before this proceeding was instituted, the courts found that petitioner, if not enjoined, would continue to violate the securities laws. And in *Cooper*, the district court stated that petitioner's "entire course of conduct reflects a conscious purpose to obscure his knowing participation in * * * fraudulent activities" and that petitioner's testimony before the court was a "calculated and cunning attempt * * * to cover up his [prior derelictions]." 402 F. Supp. at 518.

The Commission, in enumerating the public interest considerations in support of its sanction, stated that petitioner's knowing and well-calculated participation in two separate schemes to manipulate the securities market so as to sell worthless securities at an excessive price struck "at the integrity of the pricing process on which all market participants rely" (Pet. App. 10a) and was the very type of practice sought to be remedied by the Securities Exchange Act. It noted also that the gravity of his offenses was compounded by petitioner's "deliberately evasive

testimony" (*id.* at 11a) before the district court. The Commission accordingly gave little weight to petitioner's evidence of character reform; it found that the public interest supported the sanction it imposed. The court of appeals affirmed, stating that the issues presented for review did not warrant an opinion (Pet. App. 1a-2a).

ARGUMENT

The decision of the court of appeals is correct and raises no issue that warrants review by this Court.

The question raised involves the application of settled statutory guidelines to uncontested facts.² Judicial review is limited to determining whether the agency's decision has warrant in the record and a reasonable basis in law. *E.I. duPont de Nemours & Co. v. Collins*, 432 U.S. 46 (1977); *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182 (1973). As this Court has recognized, "the relation of remedy to policy is peculiarly a matter for administrative competence." *American Power & Light Co. v. SEC*, 329 U.S. 90, 112 (1946). And an agency vested by statute with broad discretion may impose that sanction it deems best to achieve the statute's objectives. See

² As the facts alleged were admitted by petitioner, the standard of proof by which those facts were established is not at issue here. Therefore, the "clear and convincing" standard of proof, which the District of Columbia Circuit held to be applicable to an administrative determination of fraud under narrowly defined circumstances, has no relevance to this case. See *Collins v. SEC*, 562 F.2d 820 (1977).

Butz v. Glover Livestock Commission Co., *supra*, 411 U.S. at 188. The Commission's opinion set out considerations fully supporting its order barring petitioner from all aspects of the securities business for 18 months, and from certain activities thereafter. These considerations include the egregious nature of the petitioner's misconduct, the questionable prospects of his future honesty, and the deliberately evasive conduct before the district court (Pet. App. 10a-12a). The Commission's sanction had justification in fact and did not constitute an abuse of its discretion. See also *Berenyi v. Immigration Director*, 385 U.S. 630, 635-636 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DAVID FERBER
Solicitor to the Commission

MICHAEL K. WOLENSKY
Assistant General Counsel

LINDA D. FIENBERG
Special Counsel

PHILIP H. BECKER
Attorney
Securities and Exchange Commission

JUNE 1979